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November 11. 2002

William Mahcr
Chief. Wireline Compeution Bureau
Federal Communications Commission
450 12th Street S.W.
Washington. D.C. 20554

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FCC - MAILROOM

Re: ***Ex Parte***
CC Docket Nos. 01-338. 96-98. 98-147

Dear Mr. Maher:

Globalcom, Inc. ("Globalcom"), a privately held competitive local exchange telecommunications provider. files this *ex parte* letter to further comment on why requesting carriers should be able to obtain a "fresh look" at long term special access commitments when existing special access circuits are converted to Unbundled Network Elements ("UNEs").

The Commission in the Notice of Proposed Rulemaking invited comment on whether and on what bases competitive camers may be able to obtain a "fresh look" at long term special access commitments.[1] Globalcom proposes that compelitive carriers be permitted a "fresh look" *when a competitive carrier commits to maintain the converted UNE loop arid transport combination for the remaining duration of the .special access contract term.* In such a case, the incumbent local exchange camer ("ILEC") would recover its non-recurring and recurring special access tariff charges assessed prior to the conversion of the circuit and would recover the TELRIC rates for the same facilities for the same or longer duration as the CLEC's original commitment for the special access circuit.

This proposal is fair and reasonable for several reasons. First, termination liability provisions within special access tariffs are premised on the notion that the customer is terminating service permanently and are designed to compensate the provider for investing in the network facilities over which the special access services were provided. That premise is not appropriate where the circuit continues to provide service when it is re-classified as a UNE. There is no termination of service when the competitive carrier maintains the circuit, now a UNE loop/transport combination, for the remainder of the term since the circuit is simply retagged as a UNE. There is no change in the functionality of the circuit and no disconnection or interruption of service. Basically, this is nothing more than a billing change.

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1 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provision of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications, CC Docket Nos. 01-338, 96-98. & 98-141. Notice of Proposed Rulemaking, FCC 01-361, ¶ 80 (rel. Dec. 12. 2001).

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Second, termination fees result in an inequitable monetary windfall for the ILEC. This is so because the ILEC recovers both special access termination fees for circuits that the CLEC will continue to use and TELRIC rates for a period of time that is no shorter than the original term of the special access contract.

Third, termination fees are anti-competitive since they unfairly increase the operating expenses of competitive carriers and effectively remove the economic benefit of convening existing special access circuits to UNEs. By making it uneconomical to convert these circuits to UNEs, termination fees force competitive carriers to continue to pay higher special access rates rather than TELRIC based UNE rates.

Fourth, the assessment of termination fees is patently unjust. Competitive carriers purchased special access circuits as substitutes for UNEs and loop/transport combinations. As the Commission is well aware the United States Supreme Court held that the Commission's rules on combinations of network elements did in fact comply with the Telecommunications Act of 1996 and that the Eighth Circuit erred in vacating Rules 315(c)-(f). Thus, but for the Eighth Circuit's ruling err, competitive camers would not have ordered special access circuits and ILECs would not have been able to force higher special access rates or cost prohibitive termination fees on competitive camers who only needed the underlying UNEs. It is patently unfair to allow the ILECs to collect termination fees in these circumstances

It is for these reasons the FCC should find that a CLEC should be relieved of termination penalties when it converts special access circuit(s) to UNE(s) so long as the CLEC agrees to purchase the UNE(s) over the same or longer duration as the CLEC's original commitment for the special access circuit. The Commission has the authority to render such a decision and has exercised such authority in similar circumstances in the past.

Termination Fees Are Improper Because There Is No Termination Of Service If The CLEC Maintains The Loop/Transport Combination For The Remainder Of The Term

The Illinois Commerce Commission ("ICC") recently addressed the issue of whether the conversion of a special access circuit to a UNE loop/transport combination under the terms of Ameritech Illinois' intrastate special access tariff should tngger special access early termination fees if the conversion is made prior to the end of the term of the agreement.' The ICC is one of the first public utility commissions to have closely examined this issue under the terms of an intrastate special access tariff.[3]

Globalcom, Inc. v Illinois Hell Telephone Company d/b/a Amerrtech Illinois, ICC Docket 02-0365. (Ill. C.C. Oct. 23. 2002). Final Order attached hereto as Atrachmenr I

Notably, rhe ICC was asked to render a decision that interpreted Ameritech's FCC tariff bur the ICC chose nor to do so due to jurisdictional concerns. Id. at 44.

The ICC concluded that no "termination" occurs, within the meaning of that tariff. for the purposes of collecting early termination charges, when the circuir is convened, so long as, the competitive carrier agrees to maintain the UNE loop/transport combination for the *remainder of the special access term.* The ICC held that the termination charge contained in the intrastate special access tariff is

> not designed for the situation presented here, where the provider-customer relationship continues with respect to the pertinent functionality, albeit under what amounts to a greater discount then originally contemplated. The customer's continuing term commitment shields the provider from the risk of carrying unused facilities. The continuing revenue stream also insulates the provider against additional economic loss, because the forward looking cost of service is accounted for through the TELRIC cost-determination methodology.[4]

Ameritech Illinois' intrastate special access tariff mirrors its interstate special access tariff, so the FCC can readily apply the ICC's analysis to the federal tariff.

Special Access Termination Fee Clauses Are Not Designed For Conversions

Significantly, in rendering its decision, the ICC concluded that the termination fee provisions contained within special access tariffs ***were not designed nor intended for the circumstance of a conversion.*** As explained above, the termination fee provisions are predicated on the fact that the customer is actually terminating service and no longer using the facilities or functionaliry of the circuit. Conversions, on the other hand, result in the CLECs continued use of the facilities and functionality of the circuit, albeit in a UNE form. Moreover, the ILEC continues to receive compensation for the circuit through TELRIC rates.

Termination Fees Result In A Windfall

Moreover, the application of the termination fee provisions to conversions are economically damaging to CLECs and. since they are not designed for these circumstances, unfairly and wrongly result in a monetary windfall to the ILEC. The ILEC not only continues to receive revenue under TELRIC, it also receives a lump sum payment in termination fees that in many cases is ten to twenty rimes rhe monthly recurring cost. In Globalcorn's specific set of circumstances. Globalcorn would have had to pay approximately $1.3 Million in termination fees in order to convert its circuits and consequently wait over a year before it could recoup the termination fees through savings recognized by converting the circuits. Globalcom witnesses who testified in the ICC proceeding stated that the termination fees were not only cost prohibitive but also removed the benefits of TELRIC versus retail special access. Consequently, they explained that it made no economic sense to convert the circuits.

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[4] Id. at 12

More imponantly, as the ICC concluded, CLECs "continuing term commitment shields the provider from the risk of carrying unused facilities. The continuing revenue stream also insulates the provider against additional economic loss. because the CLEC will pay the ILEC the TELRIC rates for the facilities."' If ILECs are permitted to assess termination fees when circuits are converted. ILECs will be recipienrs of an unjust. unreasonable, and inequitable windfall. Specifically, the ILEC receives the retail rates that were actually paid by the CLEC prior io conversion. a termination fee (which Is the dollar difference between the tetm that could have been completed prior to conversion), plus TELRIC rates for the remainder *of* the original term, if not longer. The terminalion fee in these circumstances is. therefore. improper

Termination Fees Create An Economic Disincentive
To Convert Special Access To UNEs

Having the nght to convert existing special access circuits to UNEs has no benefit if the cost of convening the circuits is economically infeasible. One of the purposes of a termination fee is to ensure rhat the customer maintains the circuit for the duration of the term. Here, that objective results in ILECs ensuring that CLECs maintain special access circuits. not UNE combinations of loop/transport. This results in higher operating costs lor CLECs which places them at a competitive disadvantage to ILECs.

The requirement that CLECs make large up front termination payments for conversions *is* **a** significant economic disincentive to conven circuits that were ordered from special access tariffs to UNE combinations. This is especially true *for* small to medium sized carriers, such as Globalcom. that simply cannot afford let alone justify the large up front paymenrs."

Termination Fees Are Unjust
Because Circuits Were Ordered From Special Access Tariffs
Since UNE Combinations Were Unavailable At The Relevant Time

It bears emphasis, as the ICC also noted that UNE loop/transport combinations were not available to competitive carriers when ILEC UNE combination obligations were being litigated during the time that these speciai access circuits were ordered.[7] Competitive carriers had to order special access services as a substitute for UNE combinations even though the Supreme Court ultimately determined that Rules 315(c)-(f) should not have been vacated by the Eighth Circuit. It is therefore patently unfair and inequitable to permit ILECs to interpret their tariffs in a manner that allows them to

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Id. at 1?

It should be noted thar Ameritech Illinois **has** attempted to file with the ICC revised cost studies and tariffs that would significantly increase UNE rates. The prospect of significantly higher UNE rates in the near furure makes the payment of termination fees even more of a disincentive and economically unfeasible.

7 Id. at 14

assess termination fees when CLECs should have been able to order UNE combinations of loop and transport in the first instance.

The Commission Has The Authority To Relieve CLECs From Paying Termination Fees When Special Access Circuits Are Converted To UNEs

The FCC has ample authority to relieve CLECs of such termination penalties under section 4(i) *of* the 1934 Act as well as section 251 *of* the 1996 Act. Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful...and to modify other provisions of private contracts when necessary to serve the public interest."[8] The FCC has exercised this authority many times in the past with respect to "fresh look" requirements.[9]

Notably. in a matter similar to the circumstances presented here, the FCC relieved competitive camers of termination penalties when it was apparent they would create inequitable results that are inconsistent with the purposes of Section 202(a) of the Act.[10] In particular, because of these concerns and because it was ordering ILECs to convert all individual case basis ("ICB") pricing for DS3 services to generally available rates, the FCC held that it "will not permit LECs to assess converted ICB customers termination liability charges or non-recurring charges."[11] Similarly, because UNE combinations were only available at special access rates and are now available at **UNE** rates, the FCC should not permit ILECs to assess converted special access customers termination liability charges. As the FCC found in the *ICB DS3 Service Offering Order,* to do otherwise would "create inequitable results."

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8 Western Union Tel. Co. v. FCC. 815 F.2d 1495. 1501 (D.C. Cir. 1987).

9 See. e.,.. Implementation of the Local Competition Provisions in rhe Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Prnviders, CC Docket Nos. 96-98 & 95-185, First Report and Order. 11 FCC Rcd 15499, ¶ 1095 (1996) (*"Local Competition First Report and Order"*) (subsequent history omitted) (citing Expanded Interconnection with Local Telephone Company Facilities. CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463-7465 (1992), **recon**., 8 FCC Rcd 7341,7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), vacated on other grounds and remanded for further proceedings sub. nom. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (1994); Competition in the Interstate Interexchange Marketplace, CC Docket No. No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677. 2681-82 (1992) ("fresh look" in the context of 800 bundling with interexchange offerings); Amendment of the Commission's Rules Relative to Allocation of 849-851/894-896 MHz Bands, GEN Docket No. 88-96, Memorandum Opinion and Order on Reconsideration. 6 FCC Rcd 4582, 4583-84 (1991) ('fresh look" requirements Imposed in the context of air-ground radiotelephone service as condition of grant of Title III license)).

10 See Local Exchanne Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd. 8634, ¶¶ 78-79 (1989) (*"ICB DS3 Service Offering Order"*)

11 Id

12 Id.

Proposed Relief

In its Triennial Review, rhe Commission should rule there is no termination of service during the conversion of a circuit ordered from an interstate special access circuit to EELs when the CLEC has committed to continue to use and pay TELRIC rates for the facilities and functionality of the circuit for the remainder of the original term. The FCC has provided such relief in the past and should dererrnine that termination fees under the interstate special access tariffs are not applicable and not appropriate in such circumstances.

Sincerely,

M. Gavin McCarty
Chief Legal Officer
Globalcorn, Inc.

Attachment

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